## IV. EIGHTH REPORT AND ORDER

### A. Background

64. In the further notice of proposed rulemaking issued with the *CLEC Access Reform Order*, the Commission raised various questions relating to 8YY traffic originating on competitive LEC networks.[230] The Commission sought this information because AT&T had asserted that abuses surrounding competitive LEC-originated 8YY traffic justified immediately capping the access rate for this category of traffic at the rate of the competing incumbent LEC.[231] In particular, AT&T asserted that certain competitive LECs seek out customers that generate high volumes of 8YY traffic and share access revenues with these customers through agreements that provide for payments to the end-user based on the level of 8YY traffic it generates.[232]

65. The Commission requested information about the proportion of competitive LEC originating access traffic that is composed of originating 8YY service and the proportion of competitive LEC end-users that have the type of revenue-sharing agreements that AT&T described.[233] The Commission inquired whether the abuses relating to 8YY traffic that AT&T alleged should be addressed through a general rulemaking, or whether they should be left to the Commission's complaint process.[234] It asked whether competitive LECs noticed different 8YY traffic patterns depending on whether customers had entered revenue-sharing agreements, and it also asked if the access rate for originating 8YY traffic should depend on whether a competitive LEC actually offered revenue-sharing agreements to its customers.[235] The Commission also inquired whether the permitted access charge for a particular competitive LEC's originating 8YY traffic should depend on what other services it provided to its end-users.[236]

66. In response to the *Further Notice,* certain IXCs assert that the Commission would be justified in immediately capping access rates for competitive LEC 8YY traffic at the level of the competing incumbent LEC. According to these IXCs, when access rates are higher, competitive LECs enter into revenue-sharing arrangements that create incentives for the generation of 8YY traffic, which, in turn, imposes additional costs on IXCs and their 8YY subscribers and leads to network blockages that interfere with legitimate 8YY traffic.[237] They assert that competitive LECs often engage in commission schemes with large generators of 8YY traffic (hotels, airports, and college campuses), refunding to those

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230 *See CLEC Access Reform Order*, 16 FCC Rcd at 9961-64, paras. 99-104. The following discussion of issues raised in the further notice assumes that the competitive LEC originates the 8YY traffic from an end-user customer of the competitive LEC. Competitive LEC arrangements to provide access to IXCs with other carriers raise different issues that we address in section III.A.

231 *Id.* at 9961-62, para. 98.

232 *Id.*

233 *Id.* at 9962-63, para. 100.

234 *Id.* at 9962, para. 99.

235 *Id.* at 9963, paras. 101-102.

236 *Id.* at 9963, para. 103.

237 *See, e.g.*, AT&T 8YY Comments at 8-9; Sprint 8YY Comments at 7-8; WorldCom 8YY Comments at 1-3. A complete list of comments and replies is contained in Appendix D.

end-users a portion of the access revenues resulting from this type of traffic.[238] The IXCs contend that this creates the incentive for fraudulent generation of 8YY minutes as a way for end-users to create income for themselves.[239] They argue that captive IXC access customers are forced to bear the competitive LEC's cost of providing a financial incentive for institutional users to take the competitive LEC's service.[240]

67. Other commenters, including competitive LECs, maintain that there is no need to immediately cap access rates for competitive LEC 8YY traffic because the opportunity and incentive for fraudulent generation of 8YY traffic is overstated. Most commenters deny that, as a general matter, revenue-sharing arrangements motivate competitive LEC customers to generate inflated amounts of 8YY traffic.[241] They explain that the benefits of the arrangements do not accrue to the party placing the 8YY calls because a substantial portion of the traffic coming from a large 8YY generator consists of callers dialing around the institution's pre-subscribed interexchange carrier to reach a different long distance provider. For instance, an association of telecommunications professionals in higher education asserts that, on a daily basis, many university students reach the toll provider of their choice through toll-free access numbers.[242] The competitive LECs argue that the same is likely true of callers from hotels.[243] According to the competitive LECs, the calling patterns of students and hotel guests would not be affected by any revenue-sharing arrangement with the university or hotel. They further argue that the rare instances of abuse would be more appropriately dealt with through the Commission's complaint process.[244]

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238 AT&T 8YY Comments at 3; Sprint 8YY Comments at 6.

239 AT&T 8YY Comments at 8; WorldCom 8YY Comments at 2-3. AT&T asserts that on an industry-wide basis, it has been billed over $57 million in excess 8YY access charges, and that even the lower benchmark rates still have enough cushion to make this profitable for competitive LECs. AT&T 8YY Comments at 6. AT&T argues that these commission structures prevent IXCs or incumbent LECs from competing with the competitive LEC for the special access business that would previously have carried 8YY traffic from large generators. *Id.* at 6-7. AT&T contends that customers have financial incentive to inflate their number of 8YY calls because there is no cost and the commissions actually pay them for making the calls. *Id.* at 8. According to AT&T, commissions impose additional costs on all carriers – IXCs must increase their network capacity to handle the fraudulent calls; increased traffic reduces service quality for legitimate 8YY users; and 8YY subscribers must increase their answering capacity to receive calls that are not legitimate. *Id.* at 9.

240 *See* AT&T 8YY Comments at 6-7; Sprint 8YY Reply at 3-4.

241 *See* ACUTA 8YY Comments at 2-3; Focal/US LEC 8YY Comments at 3-4; Time Warner 8YY Comments at 4; TelePacific 8YY Comments at 6; ASCENT 8YY Reply at 3; Focal/US LEC 8YY Reply at 5; Time Warner 8YY Reply at 6. Many commenters also defend revenue-sharing arrangements as legal and legitimate. *See* ALTS 8YY Comments at 3-4; Focal/US LEC 8YY Comments at 5-8; TelePacific 8YY Comments at 5-6; Time Warner 8YY Comments at 3-4.

242 ACUTA 8YY Comments at 2-3 (indicating that, at one member university, approximately 50% of student callers dial around the university's pre-subscribed interexchange carrier, usually using toll-free access numbers).

243 Time Warner 8YY Comments at 5-6 (stating that callers likely are paying at least as much to place their call through a pre-paid or other calling card provider as they would be if they were simply using the pre-subscribed provider of their choice from their home phone).

244 *See* ASCENT 8YY Comments at 5; Focal/US LEC 8YY Comments at 4; MCLEC 8YY Comments at 3; ASCENT 8YY Reply at 2-3; Focal/US 8YY Reply at 14; Time Warner 8YY Reply at 7.

68. AT&T also maintains that competitive LEC access service for outbound 8YY traffic is distinct from other originating access service.[245] According to AT&T, the competitive LECs incur lower costs when they transport 8YY traffic via dedicated facilities.[246] In the case of high-capacity dedicated facilities, AT&T argues that the originating access function is already paid for by the competitive LEC's customer.[247] Further, AT&T argues that the connection between the competitive LEC's local switch and IXC point of presence is the incumbent LEC tandem, and IXCs are billed separately by the incumbent LEC for tandem access and transport charges.[248] Thus, AT&T argues that the appropriate benchmark for competitive LEC access services for outbound 8YY traffic carried over dedicated local access facilities is the incumbent LEC's local end office switching charge.[249] The competitive LECs dispute the rationale offered to support a lower benchmark rate and contend that they provide the functionality necessary to impose the full incumbent LEC switched access rate.[250]

### B. Discussion

69. For the reasons explained below, we conclude that it is not necessary immediately to cap competitive LEC access rates for 8YY traffic at the rate of the competing incumbent LEC.[251] Rather, we will permit competitive LECs to continue to charge the previously established, declining benchmark rate to which other competitive LEC access traffic is subject.

70. As the IXCs contend, some competitive LECs may have agreed to share with some customers generating a high volume of 8YY traffic a portion of the access revenues that it receives in connection with the traffic.[252] We are not persuaded, however, that the existence of these arrangements

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245 AT&T 8YY Comments at 9-10.

246 AT&T 8YY Comments at 10; AT&T 8YY Reply at 14. AT&T maintains that, where outbound 8YY traffic is carried over dedicated high-capacity facilities for customers that aggregate large volumes of 8YY traffic, the dedicated connection is generally leased by the competitive LEC to the customer. AT&T 8YY Comments at 10; AT&T 8YY Reply at 15.

247 AT&T 8YY Comments at 10; AT&T 8YY Reply at 15.

248 AT&T 8YY Comments at 10; AT&T 8YY Reply at 15.

249 AT&T 8YY Comments at 10; AT&T 8YY Reply at 15.

250 *See* Focal/US 8YY Reply at 7-10 (disputing that competitive LECs recover the costs of dedicated facilities from high volume customers and that competitive LEC's do not provide tandem switching functionality). *See also* Time Warner 8YY Reply at 7 (stating that it performs the same network functionalities and uses the same technical configuration when it provides service to large generators of 8YY traffic as it uses when providing switched access to other high capacity end-users).

251 Because we find that IXC allegations of wide-spread fraud or abuse may indeed be overstated, we also reject AT&T's request that we limit 8YY database query charges based on the incumbent LEC charges. *See* AT&T 8YY Reply at 15 n.22.

252 *See, e.g.*, TelePacific 8YY Comments at 6 (admitting that it and other competitive LECs may offer commissions to aggregators for 8YY traffic routed over their networks). *See also* Focal/US LEC 8YY Comments at 5-6 (stating that revenue sharing arrangements are commonplace in all markets characterized by competition and are quite prevalent in the telecommunications industry).

necessarily leads to the problems that the IXC commenters attribute to them.[253] Specifically, we are not convinced that the commission arrangements that competitive LECs may have entered into with 8YY generators necessarily affect the level of traffic that these customers, typically universities and hotels, generate. The IXCs have failed to demonstrate that commission payments to 8YY generators such as universities or hotels translate effectively into incentives for the individuals who actually use those facilities to place excessive or fraudulent 8YY calls. The commission payments challenged by the IXCs go to the hotel or university itself, not to the students or hotel guests who place the bulk of the 8YY calls from these institutions.[254] Accordingly, it does not appear that these commissions create any incentive for those actually placing the calls artificially to inflate their 8YY traffic.[255] Rather, as the competitive LECs contend, the primary effect of the commission payments appears to be to create a financial incentive for the institutions to switch from the incumbent to a competitive service provider.[256]

71. Furthermore, even if we were persuaded that there was an incentive for 8YY traffic generation, the fact that competitive LEC access rates are now subject to the declining benchmark should eliminate any harm to IXCs from this traffic. As the competitive LECs point out, moving access rates for 8YY traffic to the benchmark rates already denies them much of the revenue with which they might otherwise pay commissions to 8YY generators.[257] Accordingly, we question whether this practice has continued to a significant extent.[258] Moreover, because access rates for 8YY traffic must be at or below the benchmark, inflated minutes of 8YY traffic would appear to benefit rather than burden IXCs. To the extent that IXCs in the future identify what appear to be illegitimate levels of 8YY traffic coming from a particular end-user, they can continue to address these situations on a case-by-case basis, as they have done in the past.[259]

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253 For instance, ALTS notes that a competitive LEC business plan based on some commission is not necessarily less legitimate than one without, citing, as an example, a commission-paying competitive LEC simply willing to have a lower profit margin. ALTS 8YY Comments at 4.

254 *See* ACUTA 8YY Comments at 2; Focal/US LEC 8YY Comments at 3-4; Time Warner 8YY Comments at 4; Focal/US LEC 8YY Reply at 12.

255 ACUTA 8YY Comments at 2-3 (college students dial around for many reasons, including having prepaid cards different from the school's long distance provider or to charge their parents' numbers).

256 ALTS 8YY Comments at 4; Focal/US LEC 8YY Comments at 4.

257 Time Warner 8YY Comments at 5; Time Warner 8YY Reply at 6 n.7. We also decline to find that all revenue-sharing agreements between a competing LEC and its customers based on minutes of use or access revenues generated by the customer are an unjust and unreasonable practice in violation of 201(b) because such a finding is beyond the scope of this proceeding. *See* AT&T 8YY Comments at 14-15. In its *Further Notice*, the Commission posed a number of questions concerning revenue-sharing agreements for the narrow purpose of determining whether such agreements justify immediately limiting competitive LEC access rates for all 8YY traffic to the rate of the competing incumbent LEC. *See CLEC Access Reform Order*, 16 FCC Rcd at 9963, paras. 101-102. The question of whether such arrangements violate the Act is beyond the scope of the *Further Notice*.

258 Additionally, the competitive LECs contend that cell phone use is dramatically reducing the volume of 8YY traffic, since calling card and dial-around traffic accounts for much of the 8YY traffic coming from the traditional generators of this traffic. Focal/US LEC 8YY Reply at 12.

259 Because we conclude that the incentive for fraudulent generation of minutes is not as strong as the IXCs suggest, we reject claims that the complaint process is not a feasible or practical means of addressing potential abuses. *See* AT&T 8YY Comments at 13; AT&T 8YY Reply at 12-14; Sprint 8YY Comments at 8; WorldCom Comments at 2-3. The record suggests that IXC allegations of wide-spread fraud may indeed be overstated. *See*
(continued….)

72. We also reject AT&T's request that we adopt a separate competitive LEC access rate for outbound 8YY traffic carried over dedicated local access facilities. We find that the record does not support adoption of a separate lower benchmark rate based on the incumbent LEC local switching rate. To the extent that AT&T is concerned that it is paying two carriers for originating a call, we have addressed that concern by clarifying that the rate that a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions. When there are no intermediate carriers between the competitive LEC and the end-user, the fact that the end-user may provide some portion of the facilities would seem to be irrelevant. If AT&T believes that any particular competitive LEC rate or practice is unlawful, it may bring a challenge under section 208 of the Act.[260]

## V. PROCEDURAL MATTERS

### A. Supplemental Final Regulatory Flexibility Act Analysis

73. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[261] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the 1999 *Further Notice of Proposed Rulemaking* (*Notice*) in CC Docket No. 96-262.[262] The Commission sought written public comment on the proposals in that *Notice*, including comment on the IRFA. A Final Regulatory Flexibility analysis was provided in the *Sixth Report and Order,*[263] as well as the *Seventh Report and Order and Further Notice of Proposed Rulemaking (CLEC Access Reform Order)*.[264] This present Supplemental Final Regulatory Flexibility Act Analysis conforms to the RFA.[265] To the extent that any statement in this Supplemental FRFA is perceived as creating ambiguity with respect to Commission rules or statements made in the sections of these orders preceding the Supplemental FRFA, the rules and statement set forth in those preceding sections are controlling.

(Continued from previous page)
Time Warner 8YY Reply Comments at 2-3: *See also* Focal/US LEC 8YY Reply Comments at 6-7 (noting that AT&T makes its case based on a single allegation of fraud by one particular competing LEC); Network Plus 8YY Reply at 2 (stating that the IXCs "failed to produce any real evidence supporting their allegation that a 'wide-spread' problem exists with 8YY access charges"). Thus, the record does not support IXC claims of an industry-wide problem. *See, e.g.*, Sprint 8YY Comments at 8; Sprint 8YY Reply at 4.

260 *See* 47 U.S.C. § 208.

261 *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAA). Title II of the CWAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

262 *Access Charge Reform*, CC Docket No. 96-262, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221 (1999), 64 Fed. Reg. 51280 (Sept. 22, 1999).

263 *Access Charge Reform*, CC Docket No. 96-262, *Sixth Report and Order,* 15 FCC Rcd 12962 (2000), 65 Fed. Reg. 38684 (June 21, 2000)(*CALLS Order*).

264 *CLEC Access Reform Order,* 16 FCC Rcd 9923, 66 Fed. Reg. 27892 (May 21, 2001).

265 *See* 5 U.S.C. § 604.

### 1. Need for, and Objectives of, the Rules

74. In the *CLEC Access Reform Order*, the Commission revised its tariff rules more closely to align tariffed competitive LEC access rates with those of incumbent LECs.[266] Specifically, the Commission limited to a declining benchmark the amounts that competitive LECs may tariff for interstate access services; restricted the interstate access rates of competitive LECs entering new markets to the rates of the competing incumbent local exchange carrier (incumbent LEC); and established a rural exemption permitting qualifying carriers to charge rates above the benchmark for their interstate access services.[267] In adopting these rules, the Commission sought to ensure, by the least intrusive means possible, that competitive LEC access charges are just and reasonable.[268] The Commission also sought to reduce existing regulatory arbitrage opportunities, spur efficient local competition, and avoid disrupting the development of competition in the local telecommunications market.[269]

75. With this order, the Commission disposes of seven petitions for reconsideration or clarification of these rules, and a related waiver request. Specifically, the Commission rejects each of the reconsideration requests and related request for waiver, but makes several clarifications. In response to an issue raise by Qwest in a petition for clarification or, in the alternative, reconsideration,[270] the Commission clarifies that the benchmark rate is available only when a competitive LEC provides an IXC with access to the competitive LEC's own end-users.[271] The Commission finds that the rate that a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions, and we amend the current rules in accordance with this finding.[272] The Commission also clarifies that the competing incumbent LEC switching rate is the end office switching rate when a competitive LEC originates or terminates calls to end-users and the tandem switching rate when a competitive LEC passes calls between two other carriers.[273] The Commission concludes that the regulation of these rates is necessary for all the same reasons the Commission identified in the *CLEC Access Reform Order*.

76. The Commission also responds to a request by RICA to clarify whether PICCs may be tariffed in addition to the rural exemption rate specified in section 61.26(e) of the Commission's rules

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266 *CLEC Access Reform Order*, 16 FCC Rcd 9965, para. 108.

267 *See generally id.*

268 *Id.* at 9965, para. 107.

269 *Id.*

270 Qwest Petition at 2-4 (asking the Commission to clarify the rules to ensure that a competitive LEC charges only the portion of the competing incumbent LEC rate that reflects the services that the carrier actually provides). *See also supra* para. 10.

271 *See supra* para. 15.

272 *See supra* para. 17 & App. A. The Commission also finds that, prior to this order on reconsideration, it would not have been unreasonable for a competitive LEC to charge the tariffed benchmark rate for traffic to or from end-users of other carriers, provided that the carrier serving the end-user did not also charge the IXC and provided that the competitive LEC's charges were otherwise in compliance with and supported by its tariff. *See supra* para. 18.

273 *See supra* para. 21.

and whether PICCs may be tariffed when the competing incumbent LEC does not have a PICC.[274] In this order, the Commission clarifies that any PICC imposed by a competitive LEC qualifying for the rural exemption may be assessed in addition to the rural benchmark rate if and only to the extent that the competing incumbent LEC charges a PICC. In the *CLEC Access Reform Order*, the Commission found that the ability of rural competitive LECs to assess a multi-line business PICC obviated, in part, the need for a CCL charge because the PICC provided a potential revenue source.[275] This clarification will ensure that rural competitive LECs are able to assess a PICC on IXCs as intended by the Commission, but if and only to the extent that the competing incumbent LEC charges a PICC. Further, this clarification is necessary to more closely align tariffed competitive LEC access rates with those of incumbent LECs.

77. In a separate petition for clarification, U.S. TelePacific asks the Commission to clarify and establish a simple methodology by which the benchmark rate will be set where a competitive LEC service area includes territory served by more than a single incumbent LEC.[276] In this order, the Commission confirms that competitive LECs serving an area with multiple incumbent LECs can qualify for the safe harbor by charging different rates for access to particular end-users based on the access rate that would have been charged by the incumbent LEC in whose service area that particular end-user resides.[277] As an alternative method, the Commission will permit a competitive LEC to charge an IXC a blended access rate only if that rate reasonably approximates the rate that an IXC would have paid to the competing incumbent LECs for access to the competitive LEC's customers.[278] By permitting an alternative methodology based on a blended rate, the Commission seeks to ensure that the competitive LEC access rates are just and reasonable, and, at the same time, to minimize the burdens associated with establishing several different rates within a competitive LEC's service area.

### 2. Legal Basis

78. These orders are adopted pursuant to sections 1-5, 201-205, 214, 218-220, 254, 303(r), 403, 405, 502 and 503 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-155, 201-205, 214, 218-220, 254, 303(r), 403, 405, 502 and 503.

### 3. Description and Estimate of the Number of Small Entities to which the Rules Will Apply

79. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.[279] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[280] In addition, the term "small business" has the

[274] RICA Petition at 15-16. *See also supra* para. 40 (discussing this request for clarification).

[275] *Access Charge Reform Order*, 16 FCC Rcd at 9956, para. 81

[276] U.S. TelePacific Petition at 1. *See supra* para. 46.

[277] *See supra* para. 47.

[278] *See supra* para. 48.

[279] 5 U.S.C. §§ 603(b)(3), 604(a)(3).

[280] *Id.* § 601(6).

same meaning as the term "small business concern" under the Small Business Act.[281] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[282]

80. In this section, we further describe and estimate the number of small entity licensees and regulatees that may also be indirectly affected by rules adopted pursuant to this *Order*. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be the data that the Commission publishes in its *Trends in Telephone Service* report.[283] The SBA has developed small business size standards for wireline and wireless small businesses within the three commercial census categories of Wired Telecommunications Carriers,[284] Paging,[285] and Cellular and Other Wireless Telecommunications.[286] Under these categories, a business is small if it has 1,500 or fewer employees. Below, using the above size standards and others, we discuss the total estimated numbers of small businesses that might be affected by our actions.

81. We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a wired telecommunications carrier having 1,500 or fewer employees), and "is not dominant in its field of operation."[287] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[288] We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

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281 *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes such definitions(s) in the Federal Register."

282 15 U.S.C. § 632.

283 FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service*, Table 5.3 (May 2002) (*Trends in Telephone Service*).

284 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513310 (changed to 517110 in October 2002).

285 *Id.* § 121.201, NAICS code 513321 (changed to 517211 in October 2002).

286 *Id.* § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

287 5 U.S.C. § 601(3).

288 Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a); 5 U.S.C. § 601(3). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

82. *Wired Telecommunications Carriers*. The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.[289] According to Census Bureau data for 1997, there were 2,225 firms in this category, total, that operated for the entire year.[290] Of this total, 2,201 firms had employment of 999 or fewer employees, and an additional 24 firms had employment of 1,000 employees or more.[291] Thus, under this size standard, the majority of firms can be considered small.

83. *Incumbent Local Exchange Carriers (LECs)*. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to incumbent local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[292] According to Commission data,[293] 1,337 carriers reported that they were engaged in the provision of local exchange services. Of these 1,337 carriers, an estimated 1,032 have 1,500 or fewer employees and 305 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the rules and policies adopted herein.

84. *Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs), and "Other Local Exchange Carriers."* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to providers of competitive exchange services or to competitive access providers or to "Other Local Exchange Carriers," all of which are discrete categories under which TRS data are collected. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[294] According to Commission data,[295] 609 companies reported that they were engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 609 companies, an estimated 458 have 1,500 or fewer employees and 151 have more than 1,500 employees.[296] In addition, 35 carriers reported that they were "Other Local Service Providers." Of the 35 "Other Local Service Providers," an estimated 34 have 1,500 or fewer employees and one has more than 1,500 employees.[297] Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, and "Other Local Exchange Carriers" are small entities that may be affected by the rules and policies adopted herein.

[289] 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in October 2002).

[290] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 513310 (issued October 2000).

[291] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

[292] 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in October 2002).

[293] *Trends in Telephone Service* at Table 5.3.

[294] 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in October 2002).

[295] *Trends in Telephone Service* at Table 5.3.

[296] *Id.*

[297] *Id.*

85. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to interexchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[298] According to Commission data,[299] 261 companies reported that their primary telecommunications service activity was the provision of interexchange services. Of these 261 companies, an estimated 223 have 1,500 or fewer employees and 38 have more than 1,500 employees.[300] Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by the rules and policies adopted herein.

86. *Operator Service Providers (OSPs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to operator service providers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[301] According to Commission data,[302] 23 companies reported that they were engaged in the provision of operator services. Of these 23 companies, an estimated 22 have 1,500 or fewer employees and one has more than 1,500 employees.[303] Consequently, the Commission estimates that the majority of operator service providers are small entities that may be affected by the rules and policies adopted herein.

87. *Payphone Service Providers (PSPs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to payphone service providers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[304] According to Commission data,[305] 761 companies reported that they were engaged in the provision of payphone services. Of these 761 companies, an estimated 757 have 1,500 or fewer employees and four have more than 1,500 employees.[306] Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by the rules and policies adopted herein.

88. *Prepaid Calling Card Providers.* The SBA has developed a size standard for a small business within the category of Telecommunications Resellers. Under that SBA size standard, such a business is small if it has 1,500 or fewer employees.[307] According to Commission data,[308] 37 companies

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298 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in October 2002).

299 *Trends in Telephone Service* at Table 5.3.

300 *Id.*

301 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in October 2002).

302 *Trends in Telephone Service* at Table 5.3.

303 *Id.*

304 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in October 2002).

305 *Trends in Telephone Service* at Table 5.3.

306 *Id.*

307 13 C.F.R. § 121.201, NAICS code 513330 (changed to 517310 in October 2002).

308 *Trends in Telephone Service* at Table 5.3.

reported that they were engaged in the provision of prepaid calling cards. Of these 37 companies, an estimated 36 have 1,500 or fewer employees and one has more than 1,500 employees.[309] Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by the rules and policies adopted herein.

89. *Other Toll Carriers.* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to "Other Toll Carriers." This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[310] According to Commission's data,[311] 92 companies reported that their primary telecommunications service activity was the provision of other toll carriage. Of these 92 companies, an estimated 82 have 1,500 or fewer employees and ten have more than 1,500 employees.[312] Consequently, the Commission estimates that most "Other Toll Carriers" are small entities that may be affected by the rules and policies adopted herein.

90. *Paging.* The SBA has developed a small business size standard for Paging, which consists of all such firms having 1,500 or fewer employees.[313] According to Census Bureau data for 1997, in this category there was a total of 1,320 firms that operated for the entire year.[314] Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional seventeen firms had employment of 1,000 employees or more.[315] Thus, under this size standard, the majority of firms can be considered small.

91. *Cellular and Other Wireless Telecommunications.* The SBA has developed a small business size standard for Cellular and Other Wireless Telecommunication, which consists of all such firms having 1,500 or fewer employees.[316] According to Census Bureau data for 1997, in this category there was a total of 977 firms that operated for the entire year.[317] Of this total, 965 firms had

[309] *Id.*

[310] 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in October 2002).

[311] *Trends in Telephone Service* at Table 5.3.

[312] *Id.*

[313] 13 C.F.R. § 121.201, NAICS code 517211 (changed from 513321 in October 2002).

[314] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 513321 (issued October 2000).

[315] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

[316] 13 C.F.R. § 121.201, NAICS code 517212 (changed from 513322 in October 2002).

[317] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 513322 (issued October 2000).

employment of 999 or fewer employees, and an additional twelve firms had employment of 1,000 employees or more.[318] Thus, under this size standard, the majority of firms can be considered small.

92. *Broadband Personal Communications Service.* The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of $40 million or less in the three previous calendar years.[319] For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years."[320] These standards defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.[321] No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.[322] On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses. Based on this information, the Commission concludes that the number of small broadband PCS licenses will include the 90 winning C Block bidders, the 93 qualifying bidders in the D, E, and F Block auctions, the 48 winning bidders in the 1999 re-auction, and the 29 winning bidders in the 2001 re-auction, for a total of 260 small entity broadband PCS providers, as defined by the SBA small business size standards and the Commission's auction rules. We note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

93. *Narrowband Personal Communications Services.* To date, two auctions of narrowband personal communications services (PCS) licenses have been conducted. For purposes of the two auctions that have already been held, "small businesses" were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission has awarded a total of 41 licenses, out of which 11 were obtained by small businesses. To ensure meaningful participation of small business entities in future auctions, the Commission has adopted a two-tiered small business size

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318 *Id.* The census data do not provide a more precise estimate of the number of firms that have 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

319 *See Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, Report and Order, 61 FR 33859 (July 1, 1996); *see also* 47 C.F.R. § 24.720(b).

320 *See id.*

321 *See. e.g., Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 59 FR 37566 (July 22, 1994).

322 FCC News, Broadband PCS, D, E and F Block Auction Closes, No. 71744 (rel. January 14, 1997). *See also Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, WT Docket No. 97-82, Second Report and Order, 62 FR 55348 (Oct. 24,1997).

standard in the *Narrowband PCS Second Report and Order*.[323] A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small business size standards.[324] In the future, the Commission will auction 459 licenses to serve Metropolitan Trading Areas (MTAs) and 408 response channel licenses. There is also one megahertz of narrowband PCS spectrum that has been held in reserve and that the Commission has not yet decided to release for licensing. The Commission cannot predict accurately the number of licenses that will be awarded to small entities in future actions. However, four of the 16 winning bidders in the two previous narrowband PCS auctions were small businesses, as that term was defined under the Commission's Rules. The Commission assumes, for purposes of this analysis, that a large portion of the remaining narrowband PCS licenses will be awarded to small entities. The Commission also assumes that at least some small businesses will acquire narrowband PCS licenses by means of the Commission's partitioning and disaggregation rules.

94. *220 MHz Radio Service – Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a small business size standard for small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to "Cellular and Other Wireless Telecommunications" companies. This standard provides that such a company is small if it employs no more than 1,500 persons.[325] According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year.[326] Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.[327] If this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA's small business size standard.

95. *220 MHz Radio Service – Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for "small" and "very small" businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[328] This small business size standard indicates that a "small

323 *Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS*, Docket No. ET 92-100, Docket No. PP 93-253, Second Report and Order and Second Further Notice of Proposed Rulemaking, 65 FR 35875 (June 6, 2000).

324 *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Dec. 2, 1998).

325 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

326 U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Employment Size of Firms Subject to Federal Income Tax: 1997," Table 5, NAICS code 513322 (issued Oct. 2000).

327 *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

328 *Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, PR Docket No. 89-552, GN Docket No. 93-252, PP Docket No. 93-253, (continued….)

business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[329] A "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years. The SBA has approved these small business size standards.[330] Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.[331] In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.[332]

96. *800 MHz and 900 MHz Specialized Mobile Radio Licenses.* The Commission awards "small entity" and "very small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years, or that had revenues of no more than $3 million in each of the previous calendar years.[333] The SBA has approved these size standards.[334] The Commission awards "small entity" and "very small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz bands to firms that had revenues of no more than $40 million in each of the three previous calendar years, or that had revenues of no more than $15 million in each of the previous calendar years.[335] These bidding credits apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. The Commission assumes, for purposes here, that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz SMR bands. There were 60 winning bidders that qualified as small or very small entities in the 900 MHz SMR auctions. Of the 1,020 licenses won in the 900 MHz auction, bidders qualifying as small or very small entities won 263 licenses. In the 800 MHz auction, 38 of the 524 licenses won were won by small and very small entities. We note

(Continued from previous page)
Third Report and Order and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943, 11068-70, paras. 291-95 (1997) (*220 MHz Third Report and Order*).

[329] *Id.* at 11068-70, para. 291.

[330] *See* letter to D. Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998).

[331] *See generally* Public Notice, "220 MHz Service Auction Closes," 14 FCC Rcd 605 (1998).

[332] Public Notice, "Phase II 220 MHz Service Spectrum Auction Closes," 14 FCC Rcd 11218 (1999).

[333] 47 C.F.R. § 90.814(b)(1).

[334] *See* Letter from Aida Alvarez, Administration, Small Business Administration to Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission (Oct. 27, 1997). *See* Letter from Aida Alvarez, Administrator, Small Business Administration to Thomas Sugrue, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission (Aug. 10, 1999).

[335] 47 C.F.R. § 90.814(b)(1) A request for approval of 800 MHz standards was sent to the SBA on May 13, 1999. The matter remains pending.

that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

97. *Private and Common Carrier Paging.* In the Paging *Third Report and Order*, we developed a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[336] A "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA has approved these size standards.[337] An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000.[338] Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. At present, there are approximately 24,000 Private-Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service,* 471 carriers reported that they were engaged in the provision of either paging and messaging services or other mobile services.[339] Of those, the Commission estimates that 450 are small, under the SBA business size standard specifying that firms are small if they have 1,500 or fewer employees.[340]

98. *700 MHz Guard Band Licensees.* In the 700 MHz Guard Band Order, we adopted a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[341] A "small business" as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000.[342] Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13,

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[336] *220 MHz Third Report and Order*, 12 FCC Rcd at 11068-70, paras. 291-295, 62 FR 16004 at paras. 291-295 (1997).

[337] *See* Letter from Aida Alvarez, Administrator, Small Business Administration to Thomas Sugrue, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission (June 4, 1999).

[338] *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, WT Docket No. 96-18, PR Docket No. 93-253, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, 10085, para. 98 (1999).

[339] *Trends in Telephone Service* at Table 5.3.

[340] *Id.* The SBA size standard is that of Paging, 13 C.F.R. § 121.201, NAICS code 517211.

[341] *See Service Rules for the 746-764 MHz Bands, and Revisions to part 27 of the Commission's Rules*, WT Docket No. 99-168, Second Report and Order, 15 FCC Rcd 5299, 5344, para. 108 (2000).

[342] *See generally* Public Notice, "220 MHz Service Auction Closes," Report No. WT 98-36 (Wireless Telecommunications Bureau, Oct. 23, 1998).

2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.[343]

99. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.[344] A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (BETRS).[345] The Commission uses the SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons.[346] There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small ity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adoptec nerein.

100. *Air-Ground Radiotelephone Service.* The Commission has ot adopted a small business size standard specific to the Air-Ground Radiotelephone Service.[347] We will use SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons.[348] There are approximately 100 licensees in the -Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under t BA small business size standard.

101. *Aviation and Marine Radio Services.* Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other Telecommunications," which is 1,500 or fewer employees.[349] Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875-157.4500 MHz (ship transmit) and 161.775-162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a "small" business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $15 million n addition, a "very small" business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed

[343] Public Notice, "700 MHz Guard Band Auction Closes," DA 01-478 (rel. Feb. 22, 2001).

[344] The service is defined in § 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

[345] BETRS is defined in §§ 22.757 and 22.759 of the Commission's Rules, 47 C.F.R. §§ 22.757 and 22.759.

[346] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[347] The service is defined in § 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

[348] 13 C.F.R § 121.201, NAICS codes 513322 (changed to 517212 in October 2002).

[349] *Id.* § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

$3 million.[350] There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as "small" businesses under the above special small business size standards.

102. *Fixed Microwave Services.* Fixed microwave services include common carrier,[351] private operational-fixed,[352] and broadcast auxiliary radio services.[353] At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other Telecommunications," which is 1,500 or fewer employees.[354] The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 22,015 common carrier fixed licensees and up to 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. We noted, however, that the common carrier microwave fixed licensee category includes some large entities.

103. *Offshore Radiotelephone Service.* This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.[355] There are presently approximately 55 licensees in this service. We are unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for "Cellular and Other Wireless Telecommunications" services.[356] Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.[357]

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350 *Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92-257, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853 (1998).

351 *See* 47 C.F.R. §§ 101 *et seq.* (formerly, Part 21 of the Commission's Rules) for common carrier fixed microwave services (except Multipoint Distribution Service).

352 Persons eligible under parts 80 and 90 of the Commission's Rules can use Private Operational-Fixed Microwave services. *See* 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

353 Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 C.F.R. Part 74. This service is available to licensees of broadcast stations and to broadcast and cable network entities. Broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile television pickups, which relay signals from a remote location back to the studio.

354 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

355 This service is governed by Subpart I of Part 22 of the Commission's Rules. *See* 47 C.F.R. §§ 22.1001-22.1037.

356 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

357 *Id.*

104. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the wireless communications services (WCS) auction. A "small business" is an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" is an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these small business size standards.[358] The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as "very small business" entities, and one that qualified as a "small business" entity. We conclude that the number of geographic area WCS licensees affected by this analysis includes these eight entities.

105. *39 GHz Service.* The Commission created a special small business size standard for 39 GHz licenses – an entity that has average gross revenues of $40 million or less in the three previous calendar years.[359] An additional size standard for "very small business" is: an entity that, together with affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[360] The SBA has approved these small business size standards.[361] The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by the rules and policies adopted herein.

106. *Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and ITFS.* Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS).[362] In connection with the 1996 MDS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years.[363] The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. MDS also includes licensees of stations authorized prior to the auction. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating $12.5 million or less in annual receipts.[364] According to Census Bureau data for 1997, there were a total

[358] *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Dec. 2, 1998).

[359] *See* Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, *Report and Order*, 63 FR 6079 (Feb. 6, 1998).

[360] *Id.*

[361] *See* Letter to Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Feb. 4, 1998).

[362] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, MM Docket No. 94-131 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593 para. 7 (1995).

[363] 47 C.F.R. § 21.961(b)(1).

[364] 13 C.F.R. § 121.201, NAICS code 513220 (changed to 517510 in October 2002).

of 1,311 firms in this category, total, that had operated for the entire year.[365] Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein. This SBA small business size standard also appears applicable to ITFS. There are presently 2,032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.[366] Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

107. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.[367] The auction of the 1,030 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[368] An additional small business size standard for "very small business" was added as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[369] The SBA has approved these small business size standards in the context of LMDS auctions.[370] There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 40 winning bidders. Based on this information, we conclude that the number of small LMDS licenses consists of the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers.

108. *218-219 MHz Service.* The first auction of 218-219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Area licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, the small business size standard was an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the

365 U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 513220 (issued October 2000).

366 In addition, the term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

367 *See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, and to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, Second Report and Order, 12 FCC Rcd 12545 (1997).

368 *Id.*

369 *See id.*

370 *See* Letter to Dan Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998).

previous two years.[371] In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, we established a small business size standard for a "small business" as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not to exceed $15 million for the preceding three years.[372] A "very small business" is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not to exceed $3 million for the preceding three years.[373] The SBA has approved these size standards.[374] We cannot estimate, however, the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218-219 MHz spectrum.

109. *24 GHz – Incumbent Licensees.* This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard is that of "Cellular and Other Wireless Telecommunications" companies. This category provides that such a company is small if it employs no more than 1,500 persons.[375] According to Census Bureau data for 1997, there were 977 firms in this category that operated for the entire year.[376] Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.[377] Thus, under this size standard, the great majority of firms can be considered small. These broader census data notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent[378] and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

110. *24 GHz – Future Licensees.* With respect to new applicants in the 24 GHz band, the small business size standard for "small business" is an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not in excess of $15 million.[379]

371 *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fourth Report and Order, 59 FR 24947 (May 13, 1994).

372 *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, WT Docket No. 98-169, Report and Order and Memorandum Opinion and Order, 64 FR 59656 (Nov. 3, 1999).

373 *Id.*

374 *See* Letter to Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration (Jan. 6, 1998).

375 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

376 U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Employment Size of Firms Subject to Federal Income Tax: 1997," Table 5, NAICS code 513322 (issued Oct. 2000).

377 *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

378 Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

379 *Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934, 16967 (2000); *see also* 47 C.F.R. § 101.538(a)(2).

"Very small business" in the 24 GHz band is an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years.[380] The SBA has approved these small business size standards.[381] These size standards will apply to the future auction, if held.

111. *Internet Service Providers*. While internet service providers (ISPs) are only indirectly affected by our present actions, and ISPs are therefore not formally included within this present IRFA, we have addressed them informally to create a fuller record and to recognize their participation in this proceeding. The SBA has developed a small business size standard for Online Information Services, which consists of all such companies having $21 million or less in annual receipts.[382] According to Census Bureau data for 1997, there were 2,751 firms in this category, total, that operated for the entire year.[383] Of this total, 2,659 firms had annual receipts of $9,999,999 or less, and an additional 67 had receipts of $10 million to $24,999,999.[384] Thus, under this size standard, the great majority of firms can be considered small.

112. *Satellite Service Carriers*. The SBA has developed a size standard for small businesses within the category of Satellite Telecommunications. Under that SBA size standard, such a business is small if it has 1,500 or fewer employees.[385] According to Commission data, 31 carriers reported that they were engaged in the provision of satellite services.[386] Of these 31 carriers, an estimated 25 have 1,500 or fewer employees and six, alone or in combination with affiliates, have more than 1,500 employees.[387] Consequently, the Commission estimates that there are 31 or fewer satellite service carriers which are small businesses that may be affected by the rules and policies proposed herein.

### 4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

113. In this order, the Commission finds that the rate that a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions, and we amend the current rules in accordance with this finding. This amendment requires competitive LECs to review the federal tariff of the competing incumbent LEC to determine the rate charged for various functions or services. Under the current rules, after June 21, 2004, review of the competing incumbent LEC's tariff is required to determine the

380 *Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd at 16967; *see also* 47 C.F.R. § 101.538(a)(1).

381 *See* Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Gary M. Jackson, Assistant Administrator, SBA (July 28, 2000).

382 13 C.F.R. § 121.201, NAICS code 514191 (changed to 518111 in October 2002).

383 U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Receipts Size of Firms Subject to Federal Income Tax: 1997," Table 4, NAICS code 514191 (issued October 2000).

384 *Id.*

385 13 CFR § 121.201, NAICS code 513340 (changed to 517410 in October of 2002).

386 *Telephone Trends Report* at Table 5.3.

387 *Id.*

"competing ILEC rate."[388] Therefore, this amendment does not modify the existing compliance requirement.

114. Pursuant to a rule clarification adopted in this order, if a competitive LEC eligible to charge a higher access rate pursuant to the rural exemption chooses to also charge a PICC, the competitive LEC is required to review the federal tariff of the competing incumbent LEC to see if the incumbent LEC for that particular end-user charges a PICC, and if so, the amount of that incumbent LEC's PICC. Under the current rules, review of the competing incumbent LEC's tariff is required to determine the rural exemption amount. Therefore, this clarification does not modify the existing compliance requirement.

### 5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

115. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[389]

116. Throughout this order, we seek to further resolve questions and contentious issues that remain with respect to competitive LEC access services. Because there are both small entity IXCs and small entity competitive LECs – often with conflicting interests in this proceeding – we expect that small entities will be affected by the clarifications adopted in this decision. As discussed below, we conclude, based on a consideration both of the steps needed to minimize significant economic impact on small entities and of significant alternatives, that our clarifications best balance the goals of removing opportunities for regulatory arbitrage and minimizing the burdens placed on carriers.

117. In this order, the Commission clarifies that the benchmark rate is available only when a competitive LEC provides an IXC with access to the competitive LEC's own end-users. With this clarification, the Commission will minimize the opportunity for regulatory arbitrage, and ensure that small IXCs continue to pay just and reasonable rates for competitive LEC switched access services. This clarification also ensures that IXCs continue to accept and pay for competitive LEC access services, thereby protecting universal connectivity.

118. In adopting this clarification, the Commission considers and rejects the alternative approach advanced by some competitive LECs, which would permit competitive LECs to charge the full benchmark rates when they provide any component of the interstate switched access services used in connecting an end-user to an IXC.[390] We believe that an approach in which rates are not tethered to the provision of particular services would be an invitation to abuse because it would enable multiple competitive LECs to impose the full benchmark rate on a single call.[391] This outcome would be

388 47 C.F.R. § 61.26(c).

389 5 U.S.C. § 603(c).

390 *See supra* paras. 14-16.

391 *See supra* para. 14.

inconsistent with the Commission's goal to ensure just and reasonable competitive LEC access rates. The approach advanced by competitive LECs also would enable competitive LECs to discriminate among IXCs, including small entities, by providing varying levels of service for the same price.[392] Thus, we believe the clarification provided will minimize the impact that excessive rates and discriminatory behavior may have on IXCs, including any small businesses.

119. The Commission finds that the rate that a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions.[393] We conclude that regulation of these rates is necessary for the all the reasons that we identified in the *CLEC Access Reform Order*.[394] Specifically, an IXC may have no choice but to accept traffic from an intermediate competitive LEC chosen by the originating or terminating carrier and it is necessary to constrain the ability of competitive LECs to exercise this monopoly power.[395] At the same time, the Commission declines to require a specific rate structure or rate elements for the services provided by a competitive LEC in an effort to minimize the regulatory burdens on competitive LECs, including small businesses.

120. In addition, the Commission clarifies that the competing incumbent LEC switching rate is the end office switching rate when a competitive LEC originates or terminates calls to end-users and the tandem switching rate when a competitive LEC passes calls between two other carriers.[396] In providing this clarification, the Commission considers and rejects the proposal advanced by NewSouth because it would allow competitive LECs to charge IXCs, including small entities, for services they may not provide.[397] We find that clarification of the competing incumbent LEC rate is necessary to avoid litigation and uncertainty.[398] Eliminating the uncertainty surrounding the existing rules will benefit both competitive LECs and IXCs, including small businesses, by preventing potential billing disputes.

121. The Commission also clarifies the application of the multi-line business PICC under the rural exemption.[399] Although Sprint advances an alternative interpretation of how the PICC is to be calculated under the rural exemption, that interpretation would deprive competitive LECs, including small entities, of additional revenues taken into account when formulating the rural exemption in the

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[392] *See supra* para. 14.

[393] *See supra* para. 17. The Commission also finds that, prior to this order on reconsideration, it would not have been unreasonable for a competitive LEC to charge the tariffed benchmark rate for traffic to or from end-users of other carriers, provided that the carrier serving the end-user did not also charge the IXC and provided that the competitive LEC's charges were otherwise in compliance with and supported by its tariff. *See supra* para. 18. In making this finding, the Commission considers and rejects arguments that prior Commission decisions addressed the appropriate rate a competitive LEC may charge when it is not serving the end-user. *See supra* para. 18. Because prior Commission decisions did not address this issue, this approach balances the interests of competitive LECs and IXCs, including small entities, by resolving disputes based on the services provided.

[394] *CLEC Access Reform Order*, 16 FCC Rcd at 9965, para. 107.

[395] *See supra* para. 17.

[396] *See supra* para. 21.

[397] *See supra* para. 20-21.

[398] *See supra* para. 21.

[399] *See supra* paras. 40-41.

*CLEC Access Reform Order*.[400] Under the clarification provided, a competitive LECs seeking to charge a PICC under the rural exemption must determine whether the competing incumbent LEC charges a PICC and the amount of that PICC. Although this imposes a minimal additional burden on competitive LECs, the additional burden is outweighed by the direct benefit of additional access revenues in rural areas in prescribed circumstances.

122. Moreover, in this order, the Commission clarifies what access rate applies when more than one incumbent LEC operates within a competitive LEC's service area.[401] The Commission agrees with competitive LECs that, without such clarification of the current rules, competitive LEC market entry will be delayed or possibly abandoned altogether because of uncertainty about rates and the prospect of IXC refusal to pay, or litigation. Eliminating the uncertainty surrounding the existing rules will benefit both competitive LECs and IXCs, including small businesses, by preventing potential billing disputes.

123. Further, in clarifying the applicable access rate in these circumstances, the Commission determined that it would permit a competitive LEC to charge an IXC a blended access rate if that rate reasonably approximates the rate that an IXC would have paid to the competing incumbent LECs for access to the competitive LEC's customers.[402] The Commission will permit a blended rate in some circumstances because it recognizes that requiring different rates for individual end-users within a service area might be particularly burdensome for small entities. Although the Commission considered specific alternative methods for determining the blended rate, it declines to specify the precise manner in which a competitive LEC must set its access rates when it serves the area of multiple incumbent LECs.[403] Rather, the Commission requires only that the blended access rate reasonably approximate the rate that an IXC would have paid to the competing incumbent LEC for access to the competitive LEC's customers.[404] The adopted approach balances the needs of small entities for flexibility in formulating a blended rate, yet ensures that the blended rate is just and reasonable in accordance with the Act.

124. Overall, we believe that this order best balances the competing goals that we have for our rules governing competitive LEC switched access charges. Neither in *CLEC Access Reform Order* nor in consideration of the petitions for reconsideration and clarification has there been any identification of additional alternatives that would have further limited the impact on all small entities while remaining consistent with Congress' pro-competitive objectives set out in the Act.

#### 6. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

125. None.

### B. Final Regulatory Flexibility Certifications (FRFC)

126. The RFA requires that a regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have

[400] *See supra* paras. 40-41.

[401] *See supra* paras. 46-48.

[402] *See supra* para. 48.

[403] *See supra* para. 48.

[404] *See supra* para. 48.

a significant economic impact on a substantial number of small entities."[405] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[406] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[407] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[408]

### 1. Fifth Order on Reconsideration

#### a. Background

127. In this order, the Commission clarifies some rules in ways that are not expected to have a significant economic impact on a substantial number of small entities. Specifically, in addition to the clarifications discussed in the supplemental FRFA above, the Commission clarifies the existing relationship between the CLEC new markets rule and the rural exemption.[409] In particular, petitioners seek confirmation that new market rule does not apply if the competitive LEC would otherwise qualify for the rural exemption.[410] The Commission agrees that this is the correct interpretation of the existing rule and amends rule 61.26(e) to more clearly reflect the Commission's original intent.[411] The Commission also amends rule 61.26(e) to remove references to rate elements that have been eliminated by the Commission.[412] Further, the Commission clarifies the source of its authority to impose interconnection obligations on IXCs under section 201(a).[413]

#### b. Substantive Information

128. The amendment to section 61.26(e) of the Commission rules simply clarifies and codifies the existing relationship between the CLEC new markets rule and the rural exemption, and removes references to rate elements that have since been eliminated by the Commission. Because there is no change to the meaning or impact of the existing rule, this amendment will have no significant economic

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405 *Id.* § 605(b).

406 *Id.* § 601(6).

407 *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes such definitions(s) in the Federal Register."

408 15 U.S.C. § 632.

409 *See supra* para. 30 (discussing the relationship between subsections (d) and (e) of section 61.26 of the Commission's rules).

410 *See* MCLEC Petition at 11-13; RICA Petition at 11-12. *See also supra* para. 30.

411 *See supra* para. 30 & App. A.

412 *See supra* note 137 & App. A.

413 *See supra* paras. 59-61.

impact. Similarly, the Commission's clarification concerning the source of its authority does not change the meaning or impact of the existing rule on large and small entities.

129. Therefore, we certify that these requirements will not have a significant economic impact on a substantial number of small entities.

### 2. Eighth Report and Order

#### a. Background Information

130. In the *Eighth Report and Order*, the Commission declines to set a separate access rate for originating toll-free (8YY) traffic and allows it to be governed by the same declining benchmark that applies to other competitive LEC interstate access traffic.[414] In a further notice of proposed rulemaking issued with the *CLEC Access Reform Order*, the Commission raised questions relating to 8YY traffic originating on competitive LEC networks.[415] The Commission sought this information because AT&T had asserted that abuses surrounding competitive LEC-originated 8YY traffic justified immediately capping the access rate for this category of traffic at the rate of the competing incumbent LEC.[416] The Commission determines that the record does not support IXCs' claims that commission payments to 8YY generators translate effectively into incentives for the individuals who actually use those facilities to place excessive or fraudulent 8YY calls.[417]

#### b. Substantive Information

131. Because competitive LECs currently charge IXCs the previously established, declining benchmark rate for 8YY traffic, the Commission's decision results in no change to existing competitive LEC access charges for 8YY traffic. Thus, the Commission's decision will have no significant economic impact on competitive LECs or IXCs, large and small.

132. Therefore, we certify that these requirements will not have a significant economic impact on a substantial number of small entities.

### C. No Regulatory Flexibility Analysis or Certification Required

133. In the *CLEC Access Reform Order*, the Commission provided an FRFA that conformed to the RFA.[418] In this present order, the Commission denies petitions for reconsideration and a petition for waiver.[419] Because the Commission promulgates no additional or revised final rules in response to petitions for reconsideration or the petition for waiver, our present action on these petitions is not an RFA matter.

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414 *See supra* paras. 69-72.

415 *See CLEC Access Reform Order*, 16 FCC Rcd at 9961-64, paras. 99-104.

416 *Id.* at 9961-62, para. 98.

417 *See supra* para. 70.

418 *Id.* at 9964-71, paras. 106-28.

419 Specifically, the Commission denies petitions for reconsideration filed by Focal Communications, Corp. and US LEC Corp., Qwest Communications International, Inc., TDS Metrocom, Inc., and Time Warner Telecom. The petition for waiver was filed by Z-Tel Communications, Inc.

### D. Final Paperwork Reduction Act Analysis

134. This action contained herein contains no new or modified information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13.

### E. Report to Congress

135. The Commission will send a copy of these orders, including this Supplemental FRFA and FRFCs, in a report to be sent to Congress pursuant to the Congressional Review Act.[420] In addition, the Commission will send a copy of these orders, including the Supplemental FRFA and FRFCs, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of these orders and Supplemental FRFA (or summaries thereof) and FRFCs will also be published in the Federal Register.[421]

## VI. ORDERING CLAUSES

136. Accordingly, IS IT ORDERED that, pursuant to the authority contained in sections 1-5, 201-205, 214, 218-220, 254, 303(r), 403, 405, 502 and 503 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-155, 201-205, 214, 218-220, 254, 303(r), 403, 405, 502 and 503, this EIGHTH REPORT AND ORDER AND FIFTH ORDER ON RECONSIDERATION, with all attachments, including revisions to Part 61 of the Commission's rules, 47 C.F.R. Part 61, is hereby ADOPTED.

137. IT IS FURTHER ORDERED that these orders and rule revisions adopted in these orders SHALL BECOME EFFECTIVE thirty (30) days after publication in the Federal Register.

138. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this EIGHTH REPORT AND ORDER AND FIFTH ORDER ON RECONSIDERATION, including the Supplemental Final Regulatory Flexibility Analysis and Final Regulatory Flexibility Certifications, to the Chief Counsel for Advocacy of the Small Business Administration.

139. IT IS FURTHER ORDERED that the Petitions for Reconsideration and Petitions for Clarification filed by Focal Communications Corp. and US LEC Corp:, Qwest Communications International, Inc., TDS Metrocom, Inc., and Time Warner Telecom ARE DENIED.

140. IT IS FURTHER ORDERED that the Petition for Clarification filed by U.S. TelePacific Corp. IS DENIED IN PART AND GRANTED IN PART, to the extent discussed herein.

141. IT IS FURTHER ORDERED that the Petitions for Reconsideration and/or Clarification filed by the Minnesota CLEC Consortium and Rural Independent Competitive Alliance ARE DENIED IN PART AND GRANTED IN PART, to the extent discussed herein.

142. IT IS FURTHER ORDERED that the Petition of Z-Tel Communications Inc., for Temporary Waiver of Commission Rule 61.26(d) is DENIED.

143. IT IS FUTHER ORDERED that the Petition of TDS Metrocom, Inc. for Stay Pending Reconsideration is DENIED AS MOOT.

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420 *See* 5 U.S.C. § 801(a)(1)(A).

421 *See* 5 U.S.C. § 604(b).

144. IT IS FURTHER ORDERED that the Emergency Petition of Mpower Communications Corp. and North County Communications, Inc. for Stay of Order is DENIED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

## APPENDIX A – Final Rules

## AMENDMENT TO THE CODE OF FEDERAL REGULATIONS

For the reasons discussed in the preamble, the Federal Communication Commission amends Part 61 of Title 47 of the Code of Federal Regulations as follows:

1. The authority citation for Part 61 continues to read as follows:

Authority: Secs. 1, 4(i), 4(j), 201-205 and 403 of the Communications Act of 1934, as amended; 47 U.S.C 151, 154(i), 154(j), 201-205 and 403, unless otherwise noted.

2. Section 61.26 is amended by revising paragraphs (a)(1) and (a)(2), revising paragraph (e), and adding a new paragraph (f) as follows:

### § 61.26 Tariffing of competitive interstate switched exchange access services.

(a) * * *
(1) *CLEC* shall mean a local exchange carrier that provides some or all of the interstate exchange access services used to send traffic to or from an end user and does not fall within the definition of "incumbent local exchange carrier" in 47 U.S.C. 251(h).
(2) *Competing ILEC* shall mean the incumbent local exchange carrier, as defined in 47 U.S.C. 251(h), that would provide interstate exchange access services, in whole or in part, to the extent those services were not provided by the CLEC.

* * *

(e) *Rural exemption.* Notwithstanding paragraphs (b) through (d) of this section, a rural CLEC competing with a non-rural ILEC shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the NECA access tariff, assuming the highest rate band for local switching. In addition to the rate described above, the rural CLEC may assess a presubscribed interexchange carrier charge if, and only to the extent that, the competing ILEC assesses this charge.

(f) If a CLEC provides some portion of the interstate switched exchange access services used to send traffic to or from an end user not served by that CLEC, the rate for the access services provided may not exceed the rate charged by the competing ILEC for the same access services.

## APPENDIX B

## PETITIONS FOR RECONSIDERTATION AND/OR CLARIFICATION
## CC DOCKET NO. 96-262

**Petitions for Reconsideration and/or Clarification**

Focal Communications Corp. and U.S. LEC Corp. (Focal Petition)
Minnesota CLEC Consortium (MCLEC Petition)
Qwest Communications International, Inc. (Qwest Petition)
Rural Independent Competitive Alliance (RICA Petition)
TDS Metrocom, Inc. (TDS Petition)
Time Warner Telecom (Time Warner Petition)
U.S. TelePacific Corp. (TelePacific Petition)

**Comments and Oppositions**

Association for Local Telecommunications Services (ALTS Comments)
Association of Communications Enterprises (ASCENT Comments)
AT&T Corp. (AT&T Opposition)
Focal Communications Corp. and US LEC Corp. (Focal Comments)
Iowa Telecommunications Services, Inc. (Iowa Telecom Opposition)
Sprint Corporation (Sprint Opposition)
Time Warner Telecom (Time Warner Comments)
WorldCom, Inc. (WorldCom Opposition)
Z-Tel Communications, Inc. (Z-Tel Opposition)

**Replies**

Association of Communications Enterprises (ASCENT Reply)
Focal Communications Corp. and US LEC Corp. (Focal Reply)
Minnesota CLEC Consortium (MCLEC Reply)
Rural Independent Competitive Alliance (RICA Reply)
TDS Metrocom, Inc. (TDS Reply)
U.S. TelePacific Corp. (TelePacific Revised Reply)

# APPENDIX C

## PETITION OF Z-TEL FOR TEMPORARY WAIVER, CCB/CPD FILE NO. 01-19

**Comments and Oppositions**

Association of Communications Enterprises (ASCENT Waiver Comments)
AT&T Corp.(AT&T Waiver Opposition)
Focal Communications Corporation and Pac-West Telecomm, Inc. (Focal/Pac-West Waiver Comments)
IDT Corporation (IDT Waiver Comments)
Sprint Communications Company L.P. (Sprint Waiver Opposition)
TDS Metrocom, Inc. and USLINK, Inc. (TDS/US LINK Waiver Comments)

**Replies**

Association for Local Telecommunications Services (ALTS Waiver Reply)
Sprint Communications Company L.P. (Sprint Waiver Reply)
Z-Tel Communications, Inc. and Z-Tel Communications of Virginia, Inc. (Z-Tel Waiver Reply)

# APPENDIX D

## COMMENTS AND REPLY COMMENTS RE ACCESS RATES FOR 8YY TRAFFIC, CC DOCKET NO. 96-262

**Comments**

Association of Communications Enterprises (ASCENT 8YY Comments)
Association for Local Telecommunications Services (ALTS 8YY Comments)
Association for Telecommunications Professionals in Higher Education (ACUTA 8YY Comments)
AT&T Corp. (AT&T 8YY Comments)
Focal Communications Corp. and US LEC Corp. (Focal/US LEC 8YY Comments)
Minnesota CLEC Consortium (MCLEC 8YY Comments)
Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO 8YY Comments)
Rural Impendent Competitive Alliance (RICA 8YY Comments)
Sprint Corporation (Sprint 8YY Comments)
Time Warner Telecom (Time Warner 8YY Comments)
U.S. TelePacific Corp. (TelePacific 8YY Comments)
WorldCom, Inc. (WorldCom 8YY Comments)
Z-Tel Communications, Inc. (Z-Tel 8YY Comments)

**Replies**

Association of Communications Enterprises (ASCENT 8YY Reply)
AT&T Corp. (AT&T Reply)
Focal Communications Corp. and US LEC Corp. (Focal/US LEC 8YY Reply)
Network Plus, Inc. (Network Plus 8YY Reply)
Sprint Corporation (Sprint 8YY Reply)
Time Warner Telecom (Time Warner 8YY Reply)
U.S. TelePacific Corp. (TelePacific 8YY Reply)

## STATEMENT OF
## CHAIRMAN MICHAEL K. POWELL

Re: *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, Petition of Z-Tel Communications, Inc. For Temporary Waiver of Commission Rule 61.26(d) to Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas*, Eighth Report and Order and Fifth Order on Reconsideration, CC Docket 96-262

Today's Order removes a regulatory quirk that has for too long led carriers into regulatory arbitrage schemes. It represents the culmination of our efforts, begun in 2001, to quiet the financial and regulatory uncertainty for both competitive LECs and inter-exchange carriers (IXCs) in the market for access services. Today, we arrive at our transition to equalized switched access rates by reaffirming our commitment to prevent arbitrage and answer a number of questions that have led to numerous disputes between carriers.

We resolve those petitions and establish a clear regulatory framework for facilities-based competitive LECs going forward. Today's order affirms our prior decision to eliminate uneconomic subsidies to certain carriers, and we reject arguments that the *CLEC Access Reform Order* somehow permits competitive LECs to charge the full benchmark rate when they provide any small piece of interstate switched access services. In so doing, we clarify that on a prospective basis, carriers are permitted to charge the full benchmark rate only to the extent that a CLEC provides an IXC with access to its own end-users. Furthermore, we give meaning to the "competing ILEC rate" that a CLEC must charge for access while preserving CLEC flexibility to structure their access rates in a manner that may vary from the incumbent LEC's rate structure. Doing so will settle the regulatory environment and will allow facilities-based CLECs to use resources for facilities investment instead of litigation. Access rates, like all other tariffed rates, must be just and reasonable under section 201(b) of the Act. Today's action ensures that carriers satisfy that statutory requirement to the benefit of providers who have deployed facilities to serve end user customers.